IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 11, 2001

ROBIN A. HOWELL v. CITY OF COLUMBIA

Appeal from the Chancery Court for Maury County
No. 93-654 Jim T. Hamilton, Judge

No. M2001-00620-COA-R3-CV - Filed October 16, 2002

Petitioner, a police officer, filed a petition in Maury County Chancery Court pursuant to Tenn. Code Ann. § 4-5-322 seeking review of a decision of the Civil Service Board for the City of Columbia. After the Department of Narcotics and Vice, including Petitioner's position as Deputy Chief, was abolished by city ordinance, the Civil Service Board determined that the City Manager was justified in returning Petitioner to his previously held position with the City of Columbia Police Department as a patrolman at a lower rate of pay. The court dismissed the petition finding that the actions of the City did not contravene the City Charter or deny the Petitioner due process of law. We affirm the decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

Gary Howell, Columbia, Tennessee, for the appellant, Robin A. Howell.

Patrick A. Flynn, Columbia, Tennessee, for the appellee, City of Columbia.

OPINION

In 1989, the City of Columbia created a new division within its police department, the Narcotics and Vice Department. Robin Howell, a patrolman with the City of Columbia Police Department, was appointed Deputy Chief[1] of the newly-created division. In 1993, the City abolished the Narcotics and Vice Department in its entirety and abolished all positions therein. As a result, Mr.

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[1] Throughout the record on appeal, Mr. Howell's position with the Department of Narcotics and Vice is referred to as both Deputy Administrator and Deputy Chief. After examining the record, we can find no distinction between the two labels for the position, and, therefore, to maintain consistency, will refer to the position as Deputy Chief.

Howell was returned to his former position with the Police Department as a patrolman and his pay was reduced.

Mr. Howell then requested and was granted a hearing before the Civil Service Board for the City of Columbia ("Board"). At the hearing, Mr. Howell argued that although the City could legally return him to the position of patrolman after the abolition of the Department of Narcotics and Vice, he was entitled to continue to receive the Deputy Chief salary. In addition, he attempted to prove that after the Department of Narcotics and Vice was abolished, a position for a Sergeant was advertised by the Police Department and that the job description of the Sergeant position was identical to that of the Deputy Chief of Narcotics and Vice. He asserted he should have been laterally transferred into that position.

The City argued that: (1) the City followed its own ordinances in abolishing the Department of Narcotics and Vice and returning Mr. Howell to his former position at his former rate of pay; (2) the job description for Sergeant is different from that of the abolished Deputy Chief position; (3) Section 6.13 of the Charter did not require the City to offer Mr. Howell any employment with the Columbia Police Department after the abolition of the Department of Narcotics and Vice or to place Mr. Howell in a different position; and (4) Mr. Howell had no vested interest in the salary he was drawing as Deputy Chief of the Department of Narcotics and Vice at the time the department was abolished.

At the close of the hearing, the hearing officer framed the issue before the Board as follows:

> The question before the board today is whether or not the City manager of the City of Columbia, Tennessee was justified in his decision to place Officer Robin Howell back in his position previously held in the police department, that being the position of patrolman at the wage of patrolman as opposed to the previous wage that he held when he was within the department of narcotics and vice and served under the capacity of a lieutenant's wage.

The Board unanimously upheld the action of the City in reinstating Mr. Howell in his previous position as patrolman at the salary applicable to that position.

I. The Lawsuit

Thereafter, Mr. Howell sought judicial review of the Board's decision pursuant to Tenn. Code Ann. § 4-5-322.[2] His petition was filed November 22, 1993. After the City failed to respond, in August of 1994 Mr. Howell filed a motion for default judgment. The City answered the petition on August 18, 1994, but failed to file the administrative record with the trial court, which is required

[2]Under Tenn. Code Ann. § 27-9-114, hearings which affect the employment status of a civil service employee by local government civil service boards are to be conducted pursuant to the Uniform Administrative Procedures Act, and judicial review of decisions resulting from such hearings "shall be in conformity with the judicial review standards under the Uniform Administrative Procedures Act, § 4-5-322."

by Tenn. Code Ann. § 4-5-322(d). No further activity occurred for almost three years. The record then includes a notice to all parties, dated June 1997, that an order of dismissal for failure to prosecute would be entered unless a party took action to set the case for trial or otherwise move it toward conclusion by a specified deadline. The record does not reveal what action, if any, either of the parties took, but also does not include an order dismissing the case for failure to prosecute. No further activity occurred until Mr. Howell filed a motion for summary judgment on December 7, 1999, based on the failure of the City to file the administrative record prior to January 8, 1994. The trial court granted the motion for summary judgment, but later set aside the judgment stating the order was erroneously entered and "should not have been entered." The court then allowed the City twenty (20) additional days in which to file the record. The administrative record was filed within the time limitation imposed by the trial court.

On appeal, Mr. Howell asserts that he was entitled to judgment due to the City's failure to file the administrative record and the delay he suffered therefrom. Tenn. Code Ann. § 4-5-322(d) provides:

> Within forty-five (45) days after service of the petition, *or within further time allowed by the court*, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. . . .

(emphasis added).

Obviously, the City did not file the record within the forty-five (45) days established by statute. Nonetheless, the language of Tenn. Code Ann. § 4-5-322(d) allows the time limitation for filing the administrative record to be extended by the court. Whether and how much to extend the deadline are questions left to the discretion of the court. Because the review conducted by the trial court pursuant to the APA is based solely on a review of the record, Tenn. Code Ann. § 4-5-322, full consideration of the merits of the controversy can only be obtained if the record is filed. The trial court's action in setting aside the judgment against the City and imposing a short time for filing the record was designed to allow review on the merits, but without further undue delay. It accomplished those purposes.

The record reveals a six-year delay from the filing of Mr. Howell's petition for judicial review to his filing of a motion for summary judgment due to the City's failure to file the record. During that time, Mr. Howell's case was subject to dismissal at least once for failure to prosecute. He survived that dismissal, but did not bring the City's failure to file the record to the attention of the trial court during that time. Mr. Howell has not demonstrated that he suffered any prejudice to his lawsuit because the record from the administrative hearing was preserved and intact.

Consequently, we conclude that the trial court properly exercised its discretion in denying judgment to Mr. Howell and allowing the controversy to proceed to determination on its merits.

After the administrative record was filed, both parties submitted short, informal statements of their positions to the trial court and agreed to submit the case to the court for a determination of whether Mr. Howell was entitled to continue to receive the salary of Deputy Chief of Narcotics and Vice after the City of Columbia abolished that position and the entire department and returned Mr. Howell to his former position of patrolman. The trial court found that Mr. Howell was not entitled to retain the higher salary after his position was abolished.

II. Evidence at the Civil Service Board Hearing

This appeal involves the review of a decision of the Civil Service Board for the City of Columbia. In a proceeding for judicial review of an administrative decision resulting from a contested case hearing under the Administrative Procedures Act, such review is generally confined to the record of the proceedings in the administrative agency. Tenn. Code Ann. § 4-5-322 (g). Thus, we begin with the facts revealed in the record of the hearing before the Board on September 21, 1993.

At the hearing, various exhibits were introduced through stipulation, including minutes of previous Board meetings, a portion of the City Charter, the ordinance abolishing the Department of Narcotics and Vice, the job description of Deputy Chief of that department, and a personnel action form concerning Officer Howell. James Boyd, the police chief, was called as a witness by Mr. Howell to testify regarding the Sergeant position which was advertised after the Narcotics and Vice Department was abolished. The job description for the Sergeant position was also introduced into evidence. The facts regarding the establishment and abolition of the position of Deputy Chief of the Department of Narcotics and Vice must be gleaned from the exhibits.

On January 1, 1989, Robin Howell, a patrolman with the City of Columbia Police Department, was appointed Deputy Chief of the newly-created Narcotics and Vice Department. According to the minutes of the December 27, 1988 meeting of the Board, permission was given on that date to "hire for ninety days" and come back before the Board. The subject of that position was re-visited at the April 25, 1989 meeting, wherein the following took place.

> Mr. Dickey [a Board member] asked if the position in the Narcotics and Vice Department which was filled by Robin Howell was a temporary appointment. Mr. Gentner [the City Manager] stated that this is not temporary, but a full-time appointment. Mr. Gentner further stated that the Narcotics and Vice Department will be evaluated by the City Council at the end of three years to determine if the department will remain or be dissolved and that, if this department is dissolved, both Frank Duncan [Chief of the Narcotics and Vice Department] and Robin Howell would be returned to their former positions and that both men understood this possibility at the time they were given their present appointments.

There is some question about the regularity of Mr. Howell's appointment to Deputy Chief. Apparently, the Board circumvented the normal Civil Service operating procedure, including testing,

because of the nature of the new division's activities and because of the new Chief's request that Mr. Howell be placed in that position because he was a person that the Chief trusted. In any event, at the May 16, 1989 Board meeting, the Director, or Chief, of the Narcotics and Vice Department appeared and requested that Mr. Howell be placed on permanent status in the position of Deputy Chief which he had held on a temporary basis since January 1. The request was approved. The City does not dispute that Mr. Howell was given full civil service status.

On March 4, 1993, the Columbia City Council passed ordinance number 1922, abolishing the Narcotics and Vice Department in its entirety. The ordinance stated, in pertinent part:

> Section 1: That the Department of Narcotics and Vice having heretofore been created in the organization of the City of Columbia, Tennessee, be and is now abolished effective July 1, 1993.
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> Section 2: That as of July 1, 1993, the Department of Narcotics and Vice shall turn over to the Columbia Police Department all duties and responsibilities that said Department of Narcotics and Vice had previously exercised and that all positions in said Department of Narcotics and Vice will be abolished.

In April of 1993, the City of Columbia advertised a job opening for a Sergeant in the Police Department. Mr. Howell did not formally apply for the position or take the required test in order to be eligible for this position. He did, however, request that the Chief of Police laterally transfer him to the Sergeant's position. The Chief testified that he, in turn, forwarded that request on to the Civil Service Board. Mr. Howell did not receive the Sergeant position.

At the hearing which is the subject of this appeal, the Chief of Police of the Columbia Police Department, James Boyd, testified regarding the differences in the Deputy Chief of Narcotics and Vice position and the Sergeant's position. Chief Boyd stated that the Deputy Chief position was limited to narcotics and vice duties while the Sergeant position would include supervisory, payroll and patrol responsibilities that were not a part of the Deputy Chief position.

As a result of the passage of the ordinance and the abolition of the Department of Narcotics and Vice, the Board returned Mr. Howell to his former position with the Police Department as a patrolman. As a result of Mr. Howell's return to the position of patrolman, his pay was reduced from Level 12, Step 6 to Level 9, Step 7.[3]

III. Standard of Review Under the APA

The standard of review in this matter is governed by Tenn. Code Ann. § 27-9-114(b)(1), which provides as follows:

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[3]We are unable to ascertain from the administrative record the exact dollar amount of the reduction of Mr. Howell's pay that resulted from his return to patrolman status.

> Judicial review of decisions by civil service boards of a county or municipality which affects the employment status of a county or city civil service employee shall be in conformity with the judicial review standards under the Uniform Administrative Procedures Act, § 4-5-322.

Tenn. Code Ann. § 4-5-322(h) states that a reviewing court may reverse or modify the Board's decision if the board's findings or conclusions are:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5) Unsupported by evidence which is both substantial and material in the light of the entire record.
> In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

In its ruling herein, the trial court stated, "[t]he City Council, pursuant to Article XVI of the Charter of the City of Columbia, Section 16.02, has the authority to combine or abolish existing departments." On appeal, Mr. Howell concedes that the City had a right to abolish the department and his position. However, he asserts that his position was not really abolished; instead, his duties were transferred to the police department. Consequently, he argues, the City merely undertook a reorganization. The result, according to Mr. Howell, is that he could not have been removed from his position and, instead, should have been transferred along with the duties to the new Sergeant position. He relies upon the following excerpt from a treatise on municipal law:

> [T]he abolition of the position cannot be used as a subterfuge to remove a police officer or firefighter other than as required by law. Such an improper subterfuge is attempted where an old position is abolished and a new one created which, in substance, is identical to the old one. Thus, merely changing the name of a position and transferring its duties to a person other than the present employee does not in fact abolish the office, and cannot have the effect of removing the employee.

EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 45.71 (3d ed. 1984) (citing *Miller v. State*, 249 Ala. 14, 29 So. 2d 411 (1947)).

His argument in this regard is based upon his factual assertion that the Sergeant position advertised a month after passage of the ordinance abolishing the Narcotics and Vice Department included the duties Mr. Howell performed as Deputy Chief.

The trial court found that the City, by ordinance, abolished the Department of Narcotics and Vice. The trial court also addressed Mr. Howell's argument that "abolition of the entire Department of Narcotics and Vice was a subterfuge to demote Mr. Howell" and found:

> There is simply no proof anywhere to be found that this was the intent of the council. There was no new position created that was identical to Mr. Howell's old position and no other employee was transferred to fill Mr. Howell's old position because that position no longer existed.

Where a factual issue exists, both the trial court and this court review the record to determine if there is substantial and material evidence to support the agency's decision. *CF Indus. v. Tennessee Pub. Serv. Comm'n*, 599 S.W.2d 536 (Tenn. 1980); *Humana of Tenn. v. Tennessee Health Facilities Comm'n*, 551 S.W.2d 664 (Tenn. 1977). Substantial and material evidence is such as a reasonable mind might accept to support a conclusion and such as to furnish a reasonably sound basis for the action under consideration. *Southern Ry. v. State Bd. Of Equalization*, 682 S.W.2d 196 (Tenn. 1984).

The record herein includes the job descriptions of the two positions as well as the testimony of the Police Chief that the jobs were not the same and did not have the same scope of responsibilities. We agree with the trial court that there was material and substantial evidence to support the Board's implicit conclusion that the new Sergeant position was not the same as the soon-to-be-abolished Deputy Chief position. Further, we agree there is no factual basis for any conclusion other than that the City abolished Mr. Howell's former position. By ordinance, the City abolished not only his position but also all others in the department which it abolished. This factual scenario differs greatly from the kind of situation described in the treatise excerpt relied upon by Mr. Howell.

Mr. Howell's other argument is that, absent misconduct, the City could not reduce a civil service employee's pay, unless there is a reduction in force. In essence, this is an argument that he had a property interest in his Deputy Chief's salary that could only be taken away in certain circumstances. One set of circumstances involves Section 6.13 of the Charter of the City of Columbia, which states:

> Whenever it may be deemed to be in the interest of efficiency or economy and recommended by the City Manager, the council may by ordinance provide for a reduction in the number of employees in any department; provided however, that in the event of any such reduction in the number of Civil Service employees thereby relieved from duty in any particular department shall be the ones who have served the shortest period of time in that department when such abolition or reduction occurs. Any Civil Service employee thus relieved from duty shall thereafter be given preference in filling the position formerly held by him if said position shall be subsequently reinstated. Said preference shall be granted, however, only after said employee shall pass the examination and otherwise meet the rules, regulations and requirements prescribed by the Civil Service Board.

Based on this provision, the trial court found that the City obviously had the authority to reduce the number of employees in any department so long as the Charter was followed. The trial court further found, however, there was not a reduction in force in either the Department of Narcotics and Vice or in the police department because the Department of Narcotics and Vice was abolished, and the Council merely transferred the three employees whose positions were abolished to other positions within the police department. The trial court found that the City "chose to transfer the affected employees to other positions rather than to terminate them completely. . . ."

The City has asserted that the abolition of the positions in the Department of Narcotics and Vice was a reduction in force and that it was accomplished in compliance with Section 6.13. We tend to agree with the trial court that the City's action herein was not a reduction in force but, rather, was an abolition of an operational unit and all positions therein pursuant to Section 16.02 of the Charter. In any event, Mr. Howell does not argue that the procedures applicable to persons who suffer loss of a position due to a reduction in force were not followed. Instead, he once again asserts that the new Sergeant position was "in substance" identical to his former position and, therefore, there was not a reduction in force. Because the facts support the conclusion that the Sergeant position was not the same as the Deputy Chief of Narcotics and Vice position, Mr. Howell's argument lacks a factual basis. To the extent this argument is really an argument that he should have been transferred into the Sergeant position, it is undisputed that he did not take the examination for that position as is required by Section 6.13.

IV. Due Process

Mr. Howell asserts that while it is within the purview of the City to abolish the Department of Narcotics and Vice and return Mr. Howell to his former position as patrolman, the City did not have the right to reduce his pay. Essentially, the crux of Mr. Howell's argument is that he had a proprietary interest in his salary as Deputy Chief that could not be taken away without due process.

To sustain a due process claim, Mr. Howell must first demonstrate that he has a property interest sufficient to trigger the procedural safeguards. *Board of Regents v. Roth*, 408 U.S. 564, 571-73, 92 S. Ct. 2701, 2706-07 (1972). Following the United States Supreme Court, the Tennessee Supreme Court has defined constitutionally-protected property interests as follows:

> The Fourteenth Amendment's procedural protection of property safeguards the security of interests that a person has already acquired in specific benefits. *Roth*, 408 U.S. at 576, 92 S. Ct. at 2708. Property interests are not created by the federal constitution. Instead, they are created and defined "by existing rules or understanding that stem from an independent source such as state law." *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709. To be entitled to procedural due process protection, a property interest must be more than a "unilateral expectation" or an "abstract need or desire." It must be a "legitimate claim of entitlement" to a specific benefit. *Id.* Indeed it is the purpose of the ancient institution of property to protect those expectations upon which people rely in their daily lives.

Rowe v. Board of Educ., 938 S.W.2d 351, 354 (Tenn. 1996) (citing *Roth*, 408 U.S. at 569-70, 92 S. Ct. at 2705).

Mr. Howell has failed to demonstrate that he had a legitimate claim of entitlement to continue being paid at the salary attached to a position which was abolished. The City's Charter clearly gave it the authority to abolish departments and the positions assigned thereto. In addition, the City had authority to reduce the number of City employees. When his position was abolished, Mr. Howell would have been without a job. The fact that Mr. Howell was given back his former position rather than suffering loss of employment does not give him an entitlement to his former salary.

Mr. Howell cannot point to any independent source of an entitlement to his former salary. Consequently, he had no protected property interest. In any event, he was given a hearing before the Board which determined the City had acted in compliance with governing requirements.

V. Conclusion

For the foregoing reasons, we affirm the decision of the trial court. The costs of this appeal are taxed to the appellant, Robin Howell, for which execution may issue, if necessary.

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PATRICIA J. COTTRELL, JUDGE